Supreme Court, U. S.
FILED
APR 8 1946
CHARLES ELMORE CROPLEY
CLERK

37

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

---

# No. 1084

---

EULARIA M. GATEWOOD, Owner of the Motor Vessel "Lillian Anne,"

*Petitioner,*

*vs.*

W. S. SANDERS, Owner of the Motor Tug "Fairwill," and THE R. C. HUFFMAN CONSTRUCTION COMPANY, Owner of the Scow No. 72-H.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

---

Leon T. Seawell,
*Counsel for Petitioner.*

# INDEX

## Subject Index


| | Page |
|---|---|
| Petition for writ of certiorari | 1 |
| Brief in support of petition | 9 |
| There was no competent person in charge of the tug | 12 |
| Those on the tug did not see the Lillian Anne until it was too late to avoid a collision | 14 |
| The tug disregarded the rules of navigation | 18 |
| If it is a crossing case, the tug was again at fault | 20 |
| There was no lookout on tug or scow | 23 |
| The scow was improperly lighted, if at all | 25 |
| There was a duty on the tug to blow danger signals and to go astern sooner than she did | 28 |
| There was no negligence in the navigation of the Lillian Anne | 29 |
| This is an important maritime question of local application conflicting seriously with applicable decisions | 29 |
| The decision as it now stands has so far departed from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision | 31 |
| Conclusion | 32 |


## Authorities Cited


| | |
|---|---|
| *The Inland*, 45 Fed. Sup. 265, 1942 A. M. C. 1007 | 14 |
| *The Pennsylvania*, 86 U. S. 125 | 20, 30 |
| *The Haven Belle* and *The Seminole*, 85 Fed. (2d) 939 | 23 |
| *N. Y. P. and N. Ry.* v. *Wilkins*, 248 Fed., Aff: 25 Fed. 42 | 24, 31 |
| *Lehigh Valley R. R. Co.* v. *N. Y. Central, etc.*, 1928 A. M. C., p. 1875 | 25 |
| *Reliable Fuel Supply Co.* v. *Palmer, et al.*, 1940 A. M. C., p. 847 | 25 |

Page

*Elmshearst* v. *Sacony*, 123, 1935 A. M. C., p. 275, 10 Fed. Supp. 341 ..... 27
*The San Clemente-Carolinian*, 1941 A. M. C., 1101 .. 28
*The Lady Lu-Harolmi III*, 1944 A. M. S., 650; 138 Fed. Supp. 309 ..... 28
*The Exeter-Trim*, 1940 A. M. C., 91; 30 Fed. Supp. 283 28
*The Pilot Rules*, Articles 18, 19, 22, 23 ..... 31

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

## No. 1084

EULARIA M. GATEWOOD, Owner of the Motor Vessel "Lillian Anne,"

*Petitioner,*

*vs.*

W. S. SANDERS, Owner of the Motor Tug "Fairwill," and THE R. C. HUFFMAN CONSTRUCTION COMPANY, a Corporation, Owner of the Scow No. 72-H.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITION

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petition of Eularia M. Gatewood, as owner of the Motor Vessel LILLIAN ANN, Petitioner, respectfully shows to this Honorable Court as follows:

The above entitled cause was a proceeding in the District Court of the United States for the Eastern District of Virginia, at Norfolk, by The R. C. Huffman Construction Company, a corporation, owner of the Scow No. 72-H against this petitioner and the Motor Tug Fairwill, owned by W. S. Sanders.

The District Court rendered an opinion wherein it found the Motor Vessel LILLIAN ANNE solely at fault, and from this decision both Eularia M. Gatewood and The R. C. Huffman Construction Company appealed to the Circuit Court of Appeals for the Fourth Circuit. The case was argued and submitted, whereupon the Circuit Court of Appeals rendered an opinion affirming the decree of the District Court on December 24, 1945. Petitions for rehearing were filed but a rehearing was denied by order entered February 5, 1946, and this petition is now presented seeking a writ to review the decision. A transcript of the record is herewith filed.

The petitioner having asked for a stay of the mandate in order to afford her the opportunity to apply to this Honorable Court for a writ of certiorari, an order was entered on March 9, 1946, granting such stay to and including April 9, 1946.

The merits of the legal questions in this case will be discussed in the brief herewith filed in support of this petition. No attempt will be made to elaborate upon them in this petition. We shall point out the reasons why we contend that this is a case in which a writ of certiorari should be issued by the Supreme Court.

The chief reason is that the judgment of the Circuit Court of Appeals constitutes a decision of an important maritime question of local application conflicting seriously with applicable decisions.

The proceeding arises out of a collision which occurred in the harbor of Norfolk, Virginia, on the early morning of November 5, 1942, between the Motor Vessel LILLIAN ANNE and the Scow No. 72-H while in tow of the Tug FAIRWILL. The location of the collision was in the intersection of the Eastern Branch of the Elizabeth River and the main channel of the Elizabeth River at a point about opposite what is known as the Chesapeake Steamship Dock.

The LILLIAN ANNE was owned by Mrs. Eularia M. Gatewood and is a motor vessel 141.5 feet long, 26.1 feet beam and 10.3 deep. At the time of the collision she was bound out from the Norfolk Navy Yard, which is located on the Southern Branch of the Elizabeth River, with 263 enlisted men and officers aboard destined for Solomon's, Maryland. In the pilot house were Captain R. W. Gatewood, who was looking out, and Captain J. S. Martin, mate of the vessel, who was attending to the steering.

The tug FAIRWILL is a diesel motor tug 58.6 feet long, 17.4 feet beam and 8.3 feet deep and was owned and operated by W. S. Sanders. She was doing towing work for the Huffman Construction Company and had the Huffman scow 72-H alongside.

The scow 72-H is a wooden, flat deck, square end, dump scow, 120 feet long, 35.3 feet wide and 13.5 feet deep, with a coaming 2 feet high extending around the openings on the scow. She was being operated by the R. C. Huffman Construction Company in the work of taking mud, which was being dredged in the upper regions of the Eastern Branch of the Elizabeth River, to a dumping ground near Craney Island. At the time of the collision the scow was light and was being returned from the dumping ground to her dredge.

The tug FAIRWILL was tied up along the starboard quarter of the scow with the stern of the tug extending some 15 feet beyond the stern of the scow and the scow extending approximately 70 feet ahead of the tug. There was no lookout whatever either on the forward end of the tug or on the forward end of the scow. The tug was carrying its regulation towing lights and the LILLIAN ANNE was also carrying her proper lights. Libellant, the R. C. Huffman Construction Company, contends that there were two white lanterns on the scow, one on the forward end being placed on the deck of the scow immediately at the

bottom and against the 2 foot high coaming. The other light they claim to have been on the top of a pump house located aft on the scow and about in the center. The witnesses from the LILLIAN ANNE deny the presence of any lights on the scow.

The course of the LILLIAN ANNE was in a general northerly direction, while the course of the tug and scow was in a general southerly direction when the tug was first observed by the LILLIAN ANNE. At that time both red and green lights of the tug were seen by the navigators of the LILLIAN ANNE at a distance of 800 yards. This indicating a meeting head-on, or nearly so, the LILLIAN ANNE gave a signal of one blast and directed her course to starboard in order to carry out a port to port passage as is required under the rule. Those on the LILLIAN ANNE heard no response from the tug to their signal, but they continued to watch the lights of the tug, and then the tug turned to her port, shutting out her red light and showing only her green. Immediately upon observing this the master of the LILLIAN ANNE ordered his engines full speed astern and blew a signal of three blasts to indicate that fact. No signal was heard from the tug until the vessels were within a few feet of one another, when the tug gave a blast of three signals indicating reversed engines upon her part and immediately the LILLIAN ANNE answered by repeating her backing signals. In spite of the reversed engines the bow of the LILLIAN ANNE came in contact with the forward end of the scow, damaging the scow but doing no damage to the LILLIAN ANNE. Immediately after the collision the master and a deck hand of the LILLIAN ANNE went below to ascertain if there was any damage to the motor vessel, and after a diligent search and finding no damage, and as the tug and scow were then headed up the Eastern Branch, the LILLIAN ANNE proceeded. This action took about ten minutes.

At the trial of the case in the District Court the District Judge found that the collision was caused solely by the negligence of the navigators of the LILLIAN ANNE and exonerated those in charge of the Tug FAIRWILL and the Scow in spite of the admissions of fault made by the mate of the tug who was in charge of her navigation at the time.

There was no dispute of fact on the question of the negligence of the Tug FAIRWILL and we printed the evidence in full of the mate of that tug together with excerpts from the remainder of the tug's crew, and asked the court to accept that evidence and apply the rules of navigation and of admiralty law to it. The Circuit Court of Appeals, however, failed to do this, resolving the matter merely by accepting certain findings of fact of the District Court and failing to consider the actual evidence from the tug in which the confessions of fault were made.

These points of negligence which we say constitute the prime reasons for the collision will be pointed out in the brief hereto appended.

The second reason for making this application for a writ is that the decision as it now stands has so far departed from the accepted and usual course of judicial procedure or has so far sanctioned such a departure by the lower court as to call for an exercise of this Court's power of supervision.

In arriving at its conclusions the court has ignored the course of proceeding as laid down by this Supreme Court and by other courts of distinction so that this case stands out as an exception to the general practice of the maritime law and without any adequate reason to support it. This failure to abide by well founded principles of admiralty law tends to create an unnecessary confusion and certainly results in an injustice in the particular case.

The jurisdiction of this Court is invoked under Rule 38 of the Supreme Court General Rules which is founded upon Section 240-A of the Judicial Code as Amended by the Act of February 13, 1925. The judgment of the Circuit Court of Appeals was entered on December 24, 1945, petition for rehearing was denied February 5, 1946, and the mandate has been stayed until and including April 9, 1946. This petition for a writ of certiorari is filed April 8, 1946.

WHEREFORE upon due consideration of this petition and the annexed brief and the certified copy of the record of the Circuit Court of Appeals for the Fourth Circuit filed herewith the respondent and petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Fourth Circuit commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in this cause to the end that the same may be reviewed and determined by this Honorable Court. And petitioner prays that upon the final consideration of this cause the said judgment of the said Circuit Court of Appeals be reversed by this Honorable Court, that the judgment of the United States District Court be reversed, and a judgment rendered in favor of the respondent, Eularia M. Gatewood.

Petitioner further prays for such other equitable and general relief as may pertain to this case and as may be competent for this Honorable Court to grant.

LEON T. SEAWELL,
*Counsel for Petitioner,*
*936 Wainwright Bldg.,*
*Norfolk, Virginia.*

STATE OF VIRGINIA,
*City of Norfolk, to-wit:*

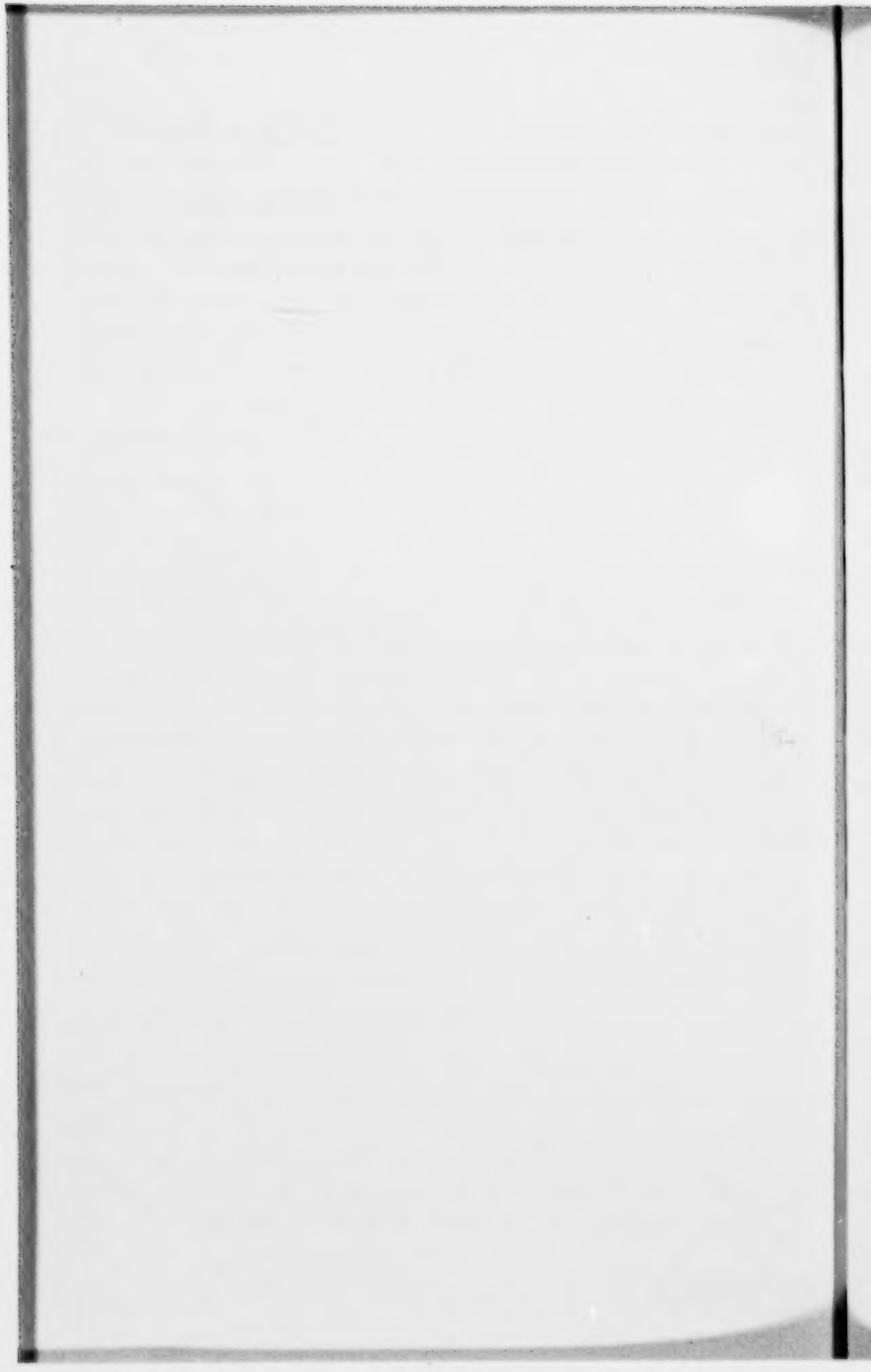
Before me, G. A. Bragg, a Notary Public, personally appeared Leon T. Seawell, who being duly sworn deposes and says that he is a member of the Bar of the Supreme Court of the United States and is proctor for the petitioner herein; that he has read the foregoing application for a writ of certiorari; and that all the facts therein stated are true and correct to the best of his knowledge and belief.

LEON T. SEAWELL.

Subscribed and sworn to before me this 5th day of April, 1946.

G. A. BRAGG,
*Notary Public.*

(Seal.)



# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

---

# No. 1084

---

EULARIA M. GATEWOOD, Owner of the Motor Vessel "Lillian Anne,"

*Petitioner,*

*vs.*

W. S. SANDERS, Owner of the Motor Tug "Fairwill," and THE R. C. HUFFMAN CONSTRUCTION COMPANY, a Corporation, Owner of the Scow No. 72-H.

---

ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

In our petition we have set out in a general way the issues involved in this case. They involve the application of the pilot rules and the decisions of courts to the facts as produced. The story of the navigation, as far as the Motor Vessel LILLIAN ANNE is concerned, is shown by the testimony of R. W. Gatewood, which is set forth in full and appears at pages 59 to 107 inclusive in this record; also that of

J. S. Martin, who was acting as Mate, and was in charge of the navigation at the time, which is shown at pages 127 to 135 of the record inclusive.

Very briefly this testimony discloses that the Motor Vessel LILLIAN ANNE was engaged at the time in carrying men and equipment from the Norfolk Navy Yard, located at the Southern Branch of the Elizabeth River, to Solomon's, Maryland, and on this occasion had left the Navy Yard with 263 men aboard and was proceeding in a general northerly direction. The weather was fair at the time, it was still dark, and the speed of the LILLIAN ANNE had not exceeded 4½ knots, as sufficient time had not elapsed for her engines to warm up.

As the LILLIAN ANNE was proceeding in this general northerly direction she was keeping well over to her own starboard side of the channel and there was no other vessel at the time in the vicinity which would interfere with her navigation or with the navigation of the tug and scow. As they approached the intersection of the Eastern Branch channel, those on the LILLIAN ANNE observed the running lights of an approaching tug some 700 or 800 yards away and in such a position that both the red and green lights of the tug were visible. They also observed the towing lights on the tug indicating that there was a tow, but due to the absence of any proper lights on the tow, properly placed, they could not tell in just what position the tow was being carried. This being the situation, the LILLIAN ANNE gave a signal of one blast of her whistle and directed her course to starboard. There is no dispute in the evidence on this point and this is exactly what the rule which has been quoted above prescribes. They proceeded upon this course for a short while, but heard no answer from the approaching tug. Instead they noticed that the tug's red light closed and only her green was showing indicating that the tug, instead of complying with the passing signal which had been

blown, was directing her course to port which would be turning into the Eastern Branch channel. Immediately upon observing this maneuver the master of the LILLIAN ANNE ordered his engines full speed astern and blew his signal of three blasts to indicate that fact. Again, this was in strict compliance with the rule. The LILLIAN ANNE, having a lefthanded engine, canted her bow to port under the reversed propeller. Shortly after this three blast signal from the LILLIAN ANNE, and when the vessels were almost in collision, the tug then for the first time blew backing signals indicating that she was putting her engines full speed astern, and immediately the LILLIAN ANNE repeated her backing signals. The effect of the reversed engines on the tug was to cant the tug's bow to starboard.

What error there could have been in this navigation of the LILLIAN ANNE we fail to see. It was strictly in compliance with the rules of the road and naturally the master of the LILLIAN ANNE expected the tug also to comply with the rules of the road.

As to the navigation of the tug and scow. We also printed in our appendix in full the testimony of George K. Hudgins, who was in charge of the navigation at the time, and whose testimony will be found on pages 25-59 inclusive of the record; also the testimony of Eugene Hudgins, a deckhand, page 108 of the record; and Thurman Woodard, a scowman, at page 141 of the record. This scow was being used in carrying mud from the dredge up the Eastern Branch of the Elizabeth River to the dumping grounds near Craney Island flats, and at the time of this collision was being towed back down the Elizabeth River and when they got to the intersection of the Eastern Branch would necessitate a rather sharp turn to her left, or port, in order to reach her destination. Such a turn would be directly across the course of the Motor Vessel LILLIAN ANNE.

At the beginning therefore it is quite obvious that the objectives of the two vessels were such that there was no cause or necessity for any particular turning on the part of the LILLIAN ANNE, but there was a necessity for a sharp change of course on the part of the tug and tow, and if we keep these objectives in mind they will explain the reasons behind the negligent acts which were emphatically shown in the record.

There were numerous errors charged against the tug and tow.

**There Was No Competent Person in Charge of the Tug**

This is at the very root of the trouble.

The tug was running one man short of her complement when the master left the tug shortly before he placed in charge Mr. Gray, who was acting as engineer; and the reason assigned for this unusual thing was that he thought the owner would be better satisfied with this man than with any other member of the crew. It does seem a little unusual for an acting engineer to be placed in charge of navigation over the mate, and it especially emphasizes the doubt that must have existed in the mind of the master as to the fitness of the mate to carry on the navigation, and, as we shall show in this argument, that idea of unfitness was thoroughly justified.

It so happened that on the trip from Craney Island that morning the tug developed engine trouble and she could proceed only under one bell. Mr. Gray then went down into the engine room and was working upon the engine when this collision occurred. There was only one man forward on either the tug or the scow and that was George K. Hudgins who was in the pilot house, with no one to assist him, no one on lookout and he being unfamiliar with the waters in that locality. Mr. Gray, the man in charge of

navigation, but who was not in the pilot house at the time, held no license whatever, his only permit being a motor boat permit. And yet he was entrusted, not only with the safety of the tug and its tow, but with the duty of navigating in a channel where he would necessarily meet other vessels.

So we come to an inspection of mate Hudgins, and we find that his qualifications are sadly lacking. He was an elderly man who had held a second mate's license, but had no license at all for Norfolk Harbor (R. 38). Twenty years before he had sailed on the Merchants & Miners steamships, but since that time his principal job had been fishing (R. 39). However, he had never brought fish down to Norfolk Harbor (R. 39). Likewise, before this venture he had never done any tugboating (R. 36). But worse than all, he was so ignorant of the situation that he didn't even know where the Southern Branch of the Elizabeth River was! The nearest he could come to it was that he thought it was somewhere in Berkley (R. 35-36-51), and everyone knows, who is at all familiar with Norfolk Harbor, that the Southern Branch is one of the most, if not the most, important watercourses in this area. As a matter of fact, the United States Navy Yard is located upon it, to say nothing of one of the largest industrial developments in the state. His eyesight was bad (R. 27). His hearing was bad (R. 27). And when he made his turn into the Eastern Branch (and across the course of the LILLIAN ANNE), he thought his course was northeast (R. 52). He did not recognize the rules of the road by their number (R. 46). And when he was being pressed upon cross-examination and evidently became so conscious of his own shortcomings, he finally exclaimed "Call me by name. I never was captain in my life" (R. 54).

This was the man solely navigating the tug and scow at the time of collision, without benefit of any assistance whatever from deckhand, lookout, or anyone at a time when it was very dark and with a scow projecting 70 feet forward

of the stem of the tug. Is it any wonder he neither saw nor heard the approaching vessel! After the collision, the engineer, Gray, took over the navigation (R. 115).

Mate Hudgins had no license for the waters in which he was navigating. Engineer Gray had no license but only a motor boat permit. The defect in the rule allowing these vessels to be operated by other than licensed men enables an owner to pick up anyone he chooses to operate his boat. The absence of a license certainly bears upon the competency of a man. In the INLAND, 45 Fed. Sup. 265; 1942 A. M. C. 1007, this point is well made by the judge as follows at page 267:

> "It appears also that Tartar was an unlicensed man and though he was not required to be a licensed man, yet that might indicate a lack of experience and must be considered."

**Those on the Tug Did Not See the Lillian Anne Until It Was Too Late to Avoid a Collision**

It is established that mate Hudgins did not see the LILLIAN ANNE until he was so close that collision was inevitable. When Hudgins first saw the LILLIAN ANNE the vessels had gotten into such a position that he only saw the red light on the LILLIAN ANNE, and about a point and a half on the tug's starboard bow (R. 47). Had he observed the approaching vessel in time, he should have seen both red and green lights, just as Captain Gatewood on the LILLIAN ANNE saw both of the tug's colored lights.

On direct examination mate Hudgins testified that the vessels were 400 to 500 yards apart when he first observed the LILLIAN ANNE. This testimony was given in court at the trial of the case on October 23, 1944, nearly two years after the time of the collision. His attention was then directed to the testimony which he had given before the U. S. Inspectors, under oath, less than a month after the collision, at

which time, he swore to the fact that the distance between the two vessels was only "75 or 100 yards." And this sighting of the vessels he claims to have made at the same time he heard this one blast signal (R. 30-31). It was then called to his attention that during the course of his testimony before the Inspectors he had made that statement in several different places. This, following in a very short period after the collision, is convincing evidence of his failure to see, and he admitted that was his best judgment at that time.

Q. "And you would not have told them that if that had not been your best judgment at that time?

A. At that time I didn't measure it. It is quite difficult to remember it, but I meditated over it and that was my best judgment at that time" (R. 30). He then attempted to say that his mistake was in saying 400 feet when he should have said 400 yards, and it was immediately called to his attention again that he had not mentioned the figure 400 at all and that his estimate of distance was "75 to 100 yards".

And this is borne out by another statement that mate Hudgins made. On the 10th day of November, 1942, only five days after the accident happened, he gave a full statement with reference to the facts of this collision and stated that "I saw the red light only on a vessel which was about a point or point and a half off my starboard bow. This vessel was about 400 feet away from my vessel at this time as far as I could estimate." This statement was notarized and the existence of it was unknown to appellant Gatewood or her proctor until after the evidence had been taken in the main case. The case was subsequently set down for oral argument before the District Judge and in the interim between the taking of the evidence and the time of the argument, the existence of this affidavit was discovered by proctor, whereupon he gave notice to proctors for the tug and at the time of argument tendered a petition and order making this a part of the evidence in the record, the fact of giving the

statement not being denied by proctors for the tug. The Court for some reason denied the motion, exception was taken and an assignment of error was directed to this action of the court.

So we find that in five days from the time of the collision he had given the distance as only 400 feet, which was entirely too close for any maneuvering to avoid a collision, and fails to explain why these lights had not been seen at least two miles away.

We have a situation where the navigator of the tug, five days after the happening, signed and swore to a statement before a notary public as to the shortness of distance; within less than a month after the accident, he gives his testimony before the United States Inspectors again as to the shortness of the distance; and then at the trial of the case, practically two years after the collision, attempts to greatly enlarge the distance. The reason for it is obvious! "The smallest slip of paper is sooner to be trusted for truth than the strongest and most retentive memory ever bestowed on mortal man." (Lumpkin, Jr., in Miller v. Cotten, 1848, 5 Ga. 341.)

That the vessels were practically on top of one another before Hudgins ever saw the LILLIAN ANNE is also borne out by the other evidence from the tug, and we now especially refer to the testimony of Eugene Hudgins, the deck hand. He was in the galley when he heard a whistle calling him on deck. He promptly went out on deck on the port side in front of the pilot house and saw the LILLIAN ANNE coming. Remember that this is the one-blast signal from the tug which mate Hudgins says he gave when he first observed the LILLIAN ANNE. When Eugene Hudgins, the deck hand, stepped on deck and saw the LILLIAN ANNE she was only "about 40 or 50 feet; and she was a little bit off our starboard bow" (R. 108 and 112). Also, the only other signal from his own tug was a three-blast signal indicating that he

was reversing his engines (R. 112). So we have a situation where the first signal, if it was intended as a passing signal, was given when the vessels were only 40 to 50 feet apart, at which time he saw the LILLIAN ANNE on the starboard bow showing its red light (R. 113). On page 114 his attention was called to his testimony before the Inspectors as follows:

"Do you remember this question and answer?
'Q. What whistles were blown?
A. A one-whistle and then I came out on deck, and later on, not over a second, I heard three whistles.'
Q. Do you remember making that statement?
A. Yes Sir."

This coincides with the testimony given by Gatewood, master of the LILLIAN ANNE, that he never heard any one-blast signal from the tug at all in response to his own original one-blast signal, and that the three-blast signal from the tug was not blown until the vessels were about 25 feet apart (R. 81). Right here, also it may be pertinent to comment on thi sone-blast signal from the tug. Those on the LILLIAN ANNE testified they never heard any such signal. Mate Hudgins testified he gave a one-blast signal (even though he changed his course to port), but in this testimony from the deck hand, Eugene Hudgins, we find that the signal which was given on the tug at the time when the vessels were very close together, was the usual call from the pilot house for the deck hand to come out. We quote from page 204 of the deck hand's testimony as follows:

"Q. And you heard this one blast which called you on deck?
A. Yes, sir.
Q. That is the usual call from the pilot house for the deck hand, isn't it?
A. Yes, sir, one blast.
Q. And it was the same kind of call that they had made for you to come out before, wasn't it, on occasions?
A. Yes, sir.

• • • • • • •

Q. What kind of whistle was that, was it just a short blast sufficient to draw your attention?
A. It was a one blast whistle, yes, sir."

It is quite apparent from this that the one-blast signal was merely the ordinary call for the deck hand to come forward and was in no sense the regular loud signal which would be blown to an approaching vessel.

This shortness of distance before observing the LILLIAN ANNE is also shown by the witness Thurman Woodard. This young man was the scowman on the 72-H and as the vessels were approaching one another he was in the engine room, where it seems most of the crew congregated while Mr. Gray was trying to work on the engine (R. 114). He heard the whistle call from his own tug just as he was "starting out of the engine room" and then he heard the three-blast signal by the time that he got "up near the galley door" (R. 141). When he came out on deck he observed the LILLIAN ANNE about 50 feet off (R. 141).

And yet, in the face of this evidence from the tug, the Court found in its memorandum opinion that the FAIRWILL was the first to make the observation of the approaching vessel, and that it did so at a point from 400 to 500 yards distant and probably more! There must be an exercise of judicial discretion in any finding, and to disregard utterly the testimony from the tug itself under such conditions, is not justified. Also, as we shall point out later on, if the tug had observed the LILLIAN ANNE at any such distance, it is all the more to be condemned for crossing the LILLIAN ANNE's course and in not complying with the passing signal.

### The Tug Disregarded the Rules of Navigation

The tug and scow were originally proceeding in a general southerly direction down the main channel of the Elizabeth River, their object being to make a port turn into the Eastern Branch to go to the dredge, when they saw, or should have

seen, the LILLIAN ANNE approaching, head on, or nearly so. The navigation is controlled by Article 18, Rule 1 of the Pilot Rules, which is as follows:

> "When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.
>
> "The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own, and by night to cases in which each vessel is in such a position as to see both the sidelights of the other.
>
> "It does not apply by day to cases in which a vessel sees another ahead crossing her own course, or by night to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead."

Under the circumstances of this case, it was the duty of the tug to refrain from turning and crossing over the course of the LILLIAN ANNE, but to make a port-port passage. When Mate Hudgins was asked if he was familiar with Article 18, Rule 1, he answered: "I don't remember" (R. 46, 47). And yet this is one of the fundamental rules

in navigation. As a matter of fact, if he intended his one-blast signal as an answer to the LILLIAN ANNE's one-blast signal, we find him in in the position of assenting to a port-to-port passage and then deliberately violating both the rule and the signal. This is a fundamental duty from which he cannot escape, and having been guilty of a violation of the rule, the burden is upon him to show that not only was it probably not a cause of the collision, but that it could not have been. This Court is very familiar with the law as laid down in THE PENNSYLVANIA, 86 U. S. 125, as follows:

> "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

**If It Is a Crossing Case, the Tug Was Again at Fault**

Upon cross-examination, mate Hudgins had testified that when he first saw the LILLIAN ANNE the vessels had gotten into a position where he only saw her red light, with the LILLIAN ANNE about a point and a half on the tug's starboard bow. He was thereupon asked the question (R. 47):

> "Q. So that made it a crossing course?
> A. Yes, sir.
> Q. And in a crossing course the vessel to the starboard has the right-of-way, isn't that correct?
> A. The vessel to the starboard, yes, sir."

He was then asked if he knew what Article 19 of the Pilot Rules provided, and again he answered that he did not (R. 46). The Rule was then read to him, and he then stated

that he knew about it. The pilot rule governing such a situation is as follows:

> "Article 19: When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side, shall keep out of the way of the other."

Articles 22 and 23 of the Pilot Rules:

> "Article 22: Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."
>
> "Article 23: Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

In order to make the situation as clear and as emphatic as possible mate Hudgins was asked the following questions and gave the following answers on cross-examination:

> "Q. There was one answer you made to Mr. Jett that I meant to ask you a little something about. You said that the LILLIAN ANNE 'had the right of way over me', is that correct?
>
> A. Yes, sir.
>
> Q. Now, why did he have the right of way over you?
>
> A. The LILLIAN ANNE?
>
> Q. Yes.
>
> A. Well, he had me on his port side, showing me his red light, and about a point and a half on my starboard bow.
>
> Q. So, that made it a crossing course, didn't it?
>
> A. Yes, sir.
>
> Q. And in a cross course the vessel to the starboard has the right of way; isn't that correct?
>
> A. The vessel to the starboard, yes, sir.
>
> Q. And what is the duty upon the burdened vessel that does not have the right of way? Do you know that?

A. What is the duty on her?

Q. Yes.

A. She is supposed to slack her speed and give the other fellow the right of way.

Q. Yes. No, I will read you Article 19:

> 'Where two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.'

You remember that now, don't you?

A. I remember that now, yes, sir—that is steam vessels, yes, sir.

Q. Well, that applies to any vessel which is propelled by machinery, does it not?

A. Yes."

To connect this situation up, we refer further to Hudgins' testimony at R. 49 as follows:

> "Q. When you saw him 400 yards off—let us take that aspect of it—in what space could you have stopped your tug and scow?
>
> A. What, sir?
>
> Q. In what space could you have stopped your tug and scow?
>
> A. Oh, I suppose she stopped in, surely 50 or 60 feet. She didn't have much headway on her.
>
> Q. She could stop in 50 or 60 feet?
>
> A. 75, anyway" (R. 47).

The Court below found that it was not a crossing case. It only became a crossing case when the tug, without observing the proximity of the LILLIAN ANNE, turned to its port across the course of the LILLIAN ANNE; but mate Hudgins, when he first observed the LILLIAN ANNE, had gotten himself into the position where he had this vessel on his starboard and could observe only her red light so that to him it was a crossing case as he testified. Here again, if it was a

crossing case, he failed to keep out of the way. Instead of keeping out of the way we find that he claims to have blown a one-blast signal to the other vessel. And this on a supposition on his part that it was a crossing case!

So we have the mate caught in the dilemma that if it was a meeting head-on situation he did not comply and pass port to port; if it was a crossing case as mate Hudgins finally decided it to be, he gave a passing signal instead of giving the right-of-way to the other vessel.

In the case of *The Haven Belle* and *The Seminole*, 85 Fed. (2d) 939, this Honorable Court said with reference to a crossing situation:

> "As the Haven Belle had the Seminole on her starboard bow, her duty to change her course and speed to avoid the collision was clear; Inland Rules, art. 19. And there is little question that the proper maneuver under the circumstances was to steer her course to starboard and pass under the stern of the Seminole. Instead of doing this, she veered to port in an attempt 'to get away from' the Seminole, and we think it clear that she was in fault in thus attempting to cross the course of that vessel. Knight's Modern Steamship (8th ed.) pp. 447-452."

**There Was No Lookout on Tug or Scow**

In this connection it is to be remembered that at the time it was very dark and the scow was projecting 70 feet ahead of the tug thus making a somewhat awkward tow.

The law requires that a lookout must be kept from a point where it can best be performed. Here we have a situation in which a small tug lashed to the starboard quarter of a light scow high out of the water and extending 70 feet forward of the stem of the tug has no lookout whatever at any point. The only person forward on either vessel was mate Hudgins, who was alone in the pilot house of the tug.

This dark object, being a scow, discolored by the mud which it was hauling, navigating while it was still very dark, constituted a menace to navigation. It was not a type of vessel which could easily be seen and was in such position and height that it formed an obstruction to anyone on the tug. According to the evidence this scow had a free board of from 8 to 10 feet, then in addition there was a coaming of 2 feet, making a total height above the surface of the water of from 10 to 12 feet over which anyone on the tug had to look. Having in mind the size of the tug it is difficult to see how the mate in the pilot house could see over this high obstruction extending along his port side and running forward for such a distance; and we respectfully submit that this contributed to mate Hudgins' failure to see the LILLIAN ANNE approaching until she was within 75 yards of her. Undoubtedly it was not until the tug swung its tow to port to head up the Eastern Branch channel that he could then see from ahead and to his starboard the LILLIAN ANNE'S red light.

Both the scowman and the deck hand of the tug were not on deck until this signal was given by mate Hudgins calling the deck hand. He then saw the LILLIAN ANNE'S red light practically on them.

This is in sharp contrast with the lookout kept upon the LILLIAN ANNE which observed the lights of this tug from 700 to 800 yards away and navigated accordingly.

In the case of *N. Y. P. and N. Ry.* v. *Wilkins*, 248 Fed., affirmed 257 Fed. 42, a N. Y. P. and N. tug was towing one of its car floats on a hawser. The question of lookout on the barge came up, and Judge Waddill held that not only should there be a lookout on the tug forward, but there should have been a lookout on the barge. We quote from his opinion at page 828 as follows:

> "Moreover, as is evident from the result in this case, good seamanship required, while operating tows of this

character over the course in question, that a lookout should be stationed upon the forward end of the barge, immediately over the water, from which position he could see and observe objects ahead, and from either side, from which danger might be anticipated. The Vedamore, 137 Fed. 844, 70 C. C. A. 342. Had such lookout been so stationed, this little gasoline launch, from whatever direction it appeared, would have been seen, and could have been readily warned off, as it was only 30 feet long, and could almost certainly, in her own length, have swung around and away from the impending peril in which it had been entrapped. Besides, a lookout so stationed could, as shown by the testimony, have released the trigger, thrown off the hawser, and dropped it overboard. The collision could thus have been avoided, regardless of whether the launch approached the car float on its starboard or port side."

See also, *Lehigh Valley R. R. Co.* v. *N. Y. Central, etc.*, 1928 A. M. C., p. 1875; *Reliable Fuel Supply Co.* v. *Palmer, et al.*, 1940 A. M. C., p. 847.

**The Scow Was Improperly Lighted, If At All**

The duty, we submit, to have the scow properly lighted was one which rested upon both the tug and the scow. The libellant Huffman Construction Company had one of its own employees on board the scow as a scowman, Thurman Woodard, and it was his duty to see to the lights. On the other hand, it is also the duty of the tug to see that its tow is properly lighted, and in this instance the tug was lashed along the starboard quarter of the scow.

There is no doubt of the fact that at the time of the collision it was very dark. Captain Gatewood of the LILLIAN ANNE states that it was "black dark night" (R. 96). Captain Martin on the LILLIAN ANNE as mate corroborates this fact (R. 128). And mate Hudgins in the pilot house of the tug, when asked about this situation, said: "Oh, it was

dark—the darkest hour is just before day you know, and a ticklish time to pick up lights, too, but the weather was fair". Therefore, lights should have been carefully attended to. It is our contention that there were no lights placed upon this scow. There was testimony from the scow and the tug that two lanterns had been placed. Even if true, certainly they were not located in conformity with the rule. The pilot rule with reference to lights to be carried by this type of vessel is as follows:

> "Scows when being towed by steam vessels on the waters covered by the first paragraph of these rules shall carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles."

The main point of this rule is that there shall be a white light at each end of the scow carried 8 feet above the water and "so placed as to show an unbroken light all around the horizon." It was for this reason that proctors for the tug proved the height of the deck of the scow to be at least 8 feet above the water. The testimony from the two men in the pilot house of the LILLIAN ANNE is positive that there were no lights on this scow and the witness Phelps, who came out on deck, saw no light, although he looked at the scow as it went down the port side of the LILLIAN ANNE after the collision. Not only was there the ordinary vision, but after the collision the searchlight of the LILLIAN ANNE

was turned on the scow in an attempt to observe what was on her and no lights or lanterns could be seen. Neither lantern was produced in court.

The Forward Light: By the evidence of the tug and scow it was proved that this forward light was an ordinary white lantern which was merely placed on the deck of the scow and immediately in front of the two feet high coaming and about 4 feet from the port forward corner of the scow. Obviously, it was impossible to see this light all around the horizon as the rule so plainly requires. It was placed in a position where a view of it was obstructed, and this would be especially true in any maneuver wherein the scow might be turned to her port such as was done in the present instance. They do not claim to have any poles or stanchions to which these lights might be fastened, but the forward light was merely placed upon the deck as above described.

The After Light: This is stated to have been placed on top of the pump house about in the center of the scow. The rule required it to be placed at a height where it would show an unbroken light all around the horizon, and at the after corner of the scow. The tug was lashed alongside the starboard quarter of the scow and the placing of a white lantern, if it was actually there, in the center of the scow aft, could very easily be mistaken for a light on the tug. Both lights, if there were any, being improperly placed, this was a clear breach of the regulation; and there again the burden of proof is heavily upon the libellant under the case of *The Pennsylvania.*

It is also a well settled principle of law that the absence of proper lights on the barge is a fault not only of the barge, but also of the attending tug. *Elmhearst* v. *Sacony,* 123, 1935 A. M. C., p. 275, 10 Fed. Supp. 341.

**There Was a Duty on the Tug to Blow Danger Signals and to Go Astern Sooner Than She Did**

We have already adverted to the fact that the tug and scow could have been stopped within a very short distance (R. 49), putting it as at a maximum of 75 feet. If, therefore, he saw the LILLIAN ANNE 75 yards away or 400 yards away, it makes no difference which, there is no possible excuse for his not stopping his engines and going into reverse in order to avoid the danger of collision. He had already admitted that the tug and scow were the burdened vessels.

The mate in charge of the tug knew what no one else on the river knew, and that was that he was attempting to handle a large, unwieldy mud scow, and with a crippled engine. Therefore, the duty was upon him to exercise extraordinary precaution in the face of danger. There was no way for the navigators of the LILLIAN ANNE to know about this. And this especially applies when mate Hudgins knew he had to make this turn. Therefore, with this knowledge in mind, when he first saw the LILLIAN ANNE, whether it be 75 to 100 yards off or 400 yards off, and saw only her red light, that should have indicated to him a situation of danger which necessitated immediate action. Instead, he simply blew, according to his own testimony, a signal of one blast and kept ahead. This is certainly a violation of the rule and in total disregard of all of the principles of good seamanship. With reference to the duty of the tug and tow in such a situation, we refer to the following cases:

*The San Clemente—Carolinian,* 1941 A. M. C. 1101;
*The Lady Lu—Harolmi III,* 1944 A. M. C. 650, 138 Fed. Sup. 309;
*The Exeter—Trim,* 1940 A. M. C. 91, 30 Fed. Sup. 283.

## There Was No Negligence in the Navigation of the Lillian Anne

In spite of the fantastic maneuvering of the tug and scow as above discussed, the Court completely exonerated Mate Hudgins and put the full blame for the collision upon the LILLIAN ANNE. And with all due respect to the District Court, we feel that it got a picture in his mind of a situation in exact reverse.

We have referred to the maneuvering of the LILLIAN ANNE heretofore necessarily so in connection with a discussion of the handling of the tug and scow. There was no dispute as to the lights of the LILLIAN ANNE and that they could be seen, nor as to her position on her own starboard hand side of the channel. She gave a proper passing signal when observing both running lights of the tug and directed her course a little to the starboard in compliance with that signal. There was no danger in the situation as far as was apparent to the navigators of the LILLIAN ANNE until the tug made its turn to port across her course. The LILLIAN ANNE's engines were stopped and reversed full speed, and a signal blown to that effect, and there is considerable testimony to the fact that she had killed her headway in the water at the time of the collision.

All of this was strictly in accordance with the Pilot Rules and we do not deem it necessary to go into further details concerning this navigation.

## This Is an Important Maritime Question of Local Application Conflicting Seriously With Applicable Decisions

The questions raised on this application involve the application of the Pilot Rules and of the long-settled principles as laid down in the decisions with reference to the navigation of vessels. The decision of the Appellate Court affirming the District Court completely overlooked and ex-

onerated all these infractions of the rules by merely adopting a statement of fact which, as we have shown above, does not coincide with the testimony of the witnesses. If we are to follow the rulings of these two decisions then our admiralty practice has been thrown into a confusion which will seriously affect the handling of future collision cases occurring in this district.

We have elaborated upon the admitted negligences of those in charge of the navigation of the tug in order that the Court may see clearly the infractions of the rules and principles applicable to admiralty.

> They blandly admitted the improper placing of the two lights which were supposed to be placed upon the scow.
>
> They had an unlicensed and incompetent man in charge of the navigation of the tug.
>
> They had no lookout either on the tug or scow.
>
> They failed to see the LILLIAN ANNE until they were too close to avoid the collision.
>
> They being the burdened vessel the tug failed to keep out of the way.
>
> They failed to give any proper signals as required.
>
> They failed to stop and reverse their engines in time as required.

In spite of all of these several items of fault which are supported by the evidence to which we have heretofore referred the Court failed utterly to recognize the principle as laid down especially in the case of the *Pennsylvania*, 86 U. S. 125. By that case the burden rested upon the tug of showing not merely that all of these faults *might not have been* any of the causes or that they probably were not, but *that they could not have been.* There has been no more settled rule, up until this time, than this principle as laid down by the Supreme Court, and yet it was flagrantly omitted in the decision of this case.

There could be no more well settled rule than is laid down in the decisions concerning lookouts. In the case of tug and tow this was emphatically stated by Judge Waddill in the case of *N. Y. P. & N. Railway* against *Wilkins,* 248 Fed., Affirmed 257 Fed. 42, a decision of our own Fourth Circuit.

The Pilot rules, Articles 18, 19, 22, and 23, are also controlling and the necessity for observing them has been stated by the courts too many times to need reference and yet we find that the tug violated them as is shown by the evidence above quoted.

The Pilot rule with reference to lights which has been quoted above is mandatory and the failure properly to observe its terms cannot be lightly excused.

The result is that we find this decision running contrary both to the well decisions and the terms of the Pilot rules themselves, and thereby creating a disruption and confusion with reference to the admiralty practice.

**The Decision as It Now Stands Has So Far Departed from the Accepted and Usual Course of Judicial Procedure as to Call for the Exercise of This Court's Power of Supervision.**

It is unnecessary further to enlarge upon the variances between the procedure followed in the decision of this case and the long and well settled line of practice and heretofore established by rule and decision. The result of this departure is not only to work a gross injustice upon the private individual but to disturb and make uncertain the future handling of maritime collision cases. This court is the only tribunal that can remedy this situation and we earnestly invoke its power of supervision in the present case.

## Conclusion

For the reasons heretofore stated, we respectfully request this court to review and reverse the decisions of the Circuit Court of Appeals for the Fourth Circuit and of the District Court of the United States for the Eastern District of Virginia and for such other relief as may be proper in the premises.

Respectfully submitted,

LEON T. SEAWELL,
*Counsel for Petitioner,*
*936 Wainwright Bldg.,*
*Norfolk, Virginia.*

(4102)

FILED
MAY 6 1946
CHARLES ELMORE CROPLEY
CLERK

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

## No. 1084

EULARIA M. GATEWOOD, OWNER OF THE MOTOR VESSEL "LILLIAN ANNE",
*Petitioner,*

*vs.*

W. S. SANDERS, OWNER OF THE MOTOR TUG "FAIRWILL", AND THE R. C. HUFFMAN CONSTRUCTION COMPANY, OWNER OF THE SCOW No. 72-H.

**BRIEF FOR W. S. SANDERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT**

GEORGE M. LANNING,
BARRON F. BLACK,
*Counsel for W. S. Sanders.*

THE RELIANCE PRESS OF NORFOLK, VA., INC.

## INDEX


| | PAGE |
|---|---|
| I. OPINIONS BELOW | 1 |
| II. JURISDICTION | 1 |
| III. STATEMENT OF FACTS | 2 |
| IV. ARGUMENT | 6 |
| A. This Case Concerns Questions of Fact Only | 6 |
| B. All of the Questions of Fact were decided against the Petitioner and there was an abundance of evidence to support this action of the lower courts | 10 |
| 1. The mate Hudgins was thoroughly competent | 10 |
| 2. The mate on the tug saw the LILLIAN ANNE in ample time, and, therefore, the position of the lookout has nothing to do with this case | 16 |
| 3. The Tug disregarded no navigational rules | 24 |
| 4. This case is not a crossing case, and even if it were, the tug did everything it could to avoid collision | 25 |
| 5. The scow was properly lighted, and the proximate cause of the collision was the failure to keep an alert lookout on the LILLIAN ANNE | 27 |
| 6. There was no duty on the tug to blow danger signals or to go astern sooner than she did | 33 |
| 7. The navigators of the LILLIAN ANNE were guilty of very gross negligence causing this collision | 37 |
| V. CONCLUSION | 39 |

## TABLE OF CITATIONS


| | PAGE |
|---|---|
| The Abbottsford, 98 U.S. 440 | 9 |
| Benson Mining Co. v. Alta Mining Company, 145 U. S. 428, 434 | 9 |
| The City of New York, 147 U. S. 72, 37 Led. 84, 90 | 39 |
| The Columbia (C.C.A. 4), 207 F. 929 | 38 |
| The City of Chester (C.C.A. 4), 78 F. 186 | 37 |
| Construction Aggregates v. Long Island R.R. (C.C.A. 2), 105 F. (2) 1009, 1012 | 37 |
| The Clara Matthieu (D.C.D. Mass.), 25 Fed. (2) 123 | 38 |
| Davis v. Schwartz, 155 U. S. 631, 638 | 9 |
| The Dexter, 23 Wall. 69; 23 Led. 84 | 10 |
| The Davidson (D.C. E.D. Va.), 244 F. 480, Affirmed C.C.A. 4, 251 F. 887 | 38 |
| Egan v. Hart, 165 U. S. 188 | 9 |
| The Eagle (C.C.A. 9), 289 F. 661 | 39 |
| The Farragut, 10 Wall. 334-338 | 10 |
| The Georgetown (C.C.A. 4), 135 F. 854, 858 | 38 |
| The Geo. L. Garlick, 91 F. 920, 926 | 36 |
| German Savings Society v. Dormitzer, 192 U.S. 125, 129 | 9 |
| The Haven Belle and The Seminole, 85 F. (2) 939 | 26 |
| The Inland, 45 F. (Supp.) 265 | 11 |
| The Lizzie Crawford (D.C. E.D. Va.), 170 Fed. 837 | 38 |
| Louis. & Nash. R.R. v. U. S., 238 U. S. 1, 10, 11 | 9 |
| The Manhasset (D.C. E.D. Va.), 34 F. 408, 423 | 36 |

TABLE OF CITATIONS (Continued)


| | Page |
|---|---|
| N.Y.P. & N. Co. v. Wilkins, 257 Fed. 42 | 9 |
| The Oregon, 158 U. S. 186; 39 Led. 943, 949 | 39 |
| The Pennsylvania, 19 Wall. 125 | 9, 10 |
| The Pocomoke (E.D. Va.), 150 Fed. 193, 198 | 10 |
| The Robert Graham Dun (C.C.A. 1), 70 Fed. 270 | 38 |
| The Syracuse, 9 Wall. 672 | 38 |
| The Transfer No. 8 (D.C.), 14 F. (2) 448, 452 (C.C.A. 2d), 25 Fed. (2) 628, 629 | 29, 32 |
| The Victory v. The Plymothian, 168 U. S. 410 | 26 |
| The Westhall (D.C. E.D. Va.), 153 F. 1010 | 38 |


STATUTES AND RULES


| | |
|---|---|
| Article 19 of the Pilot Rules | 25 |
| Article 18, Rule 1 of the Pilot Rules | 24 |
| U.S.C.A. Title 3, Sec. 367, Stand-By Act | 38 |

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

## No. 1084

EULARIA M. GATEWOOD, OWNER OF THE MOTOR VESSEL "LILLIAN ANNE",

*Petitioner,*

*vs.*

W. S. SANDERS, OWNER OF THE MOTOR TUG "FAIRWILL", AND THE R. C. HUFFMAN CONSTRUCTION COMPANY, OWNER OF THE SCOW No. 72-H.

## BRIEF FOR W. S. SANDERS IN OPPOSITION

### I. OPINIONS BELOW

The opinion of the District Court appears at page 5 of the record. The opinion of the Circuit Court of Appeals (R. 278) is reported in 152 Fed. (2) 379.

### II. JURISDICTION

The order denying rehearing of the Circuit Court of Appeals was entered on February 5, 1946. (R. 304). The petition for a writ of certiorari was filed April 8th, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by

the Act of February 13th, 1925. Only the petitioner, Eularia M. Gatewood asks for a writ. The libellant, The R. C. Huffman Construction Company does not join in this petition.

## III. STATEMENT OF FACTS

This suit arose out of a collision between a scow, the 72-H, owned by The R. C. Huffman Construction Company, and a Motor Vessel, the LILLIAN ANNE, owned by the petitioner, Eularia M. Gatewood. At the time of the collision the scow was being towed alongside by a diesel tug, the FAIRWILL, owned by W. S. Sanders.

The scow owner filed a libel against both the Motor Vessel LILLIAN ANNE, and the Tug FAIRWILL, and their respective owners, alleging negligence causing the collision, and the resultant damage to the scow, which was sunk.

The collision occured in Norfolk Harbor at a point opposite or slightly to the west of Wood's Dock, as was decided by the District Court, and not at a point opposite the Chesapeake Steamship Co. dock, as petitioner contends, in the early morning of November 5th, 1942. (See sketch of harbor lines R. 247).

The tug and scow were bound from the dumping grounds off Craney Island, in outer Norfolk harbor, to a dredge which was operating near the Ford Plant in the Eastern Branch of the Elizabeth River. The scow was lashed to the port side of the tug. The Motor Vessel, LILLIAN ANNE, had aboard 261 sailors, and she was bound from the Norfolk Navy Yard on

the Southern Branch of the Elizabeth River to Solomon's, Maryland.

While the LILLIAN ANNE was at first proceeding in a general northerly direction, yet sometime before the collision, she altered her course to the east, heading for Wood's Dock on the Norfolk side of the harbor (R. 91). When the tug was sighted the LILLIAN ANNE went even farther to the east heading towards the ferry slips on the Norfolk side (R. 92, 195, 196). The vessel's helm was twice changed to the starboard. Martin, the mate on the LILLIAN ANNE, stated that after changing the vessel's course to starboard, he then gave her a left wheel (R. 128). Since the tug had made her turn to the left and was headed towards Eastern Branch, this brought the two vessels on approximately head-on courses.

The tug and tow were proceeding very slowly, at about two miles an hour (R. 28, 95). The LILLIAN ANNE's speed was much greater. Both the District Court and the Circuit Court of Appeals held that the speed of the LILLIAN ANNE was excessive, particularly in "a busy harbor abnormally crowded under war time conditions" (R. 9, 281). Estimates of this speed ran from 4½ to 10 or 12 knots per hour (R. 172, 196, 69, 189).

George K. Hudgins was in the tug's pilot house in charge of her navigation. He had seen lights to the right ahead, but he first identified the LILLIAN ANNE when she blew a one whistle signal which indicated a desire on her part to pass the tug and tow port to port (R. 26, 42). The LILLIAN ANNE was then about a point or a point and a half on the tug's

starboard bow, 400 to 500 yards off, according to Hudgins' estimate, showing the tug only her red light (R. 26, 42), and the tug was a little down the river from Wood's dock (R. 26, 31) and heading up, or in the direction of, the Eastern Branch—she had already made the turn to the left off the old dock of the Chesapeake Steamship Company (R. 51). The tug immediately assented by answering the LILLIAN ANNE with one blast, and put her helm hard right, as there was then plenty of time and room to carry out the proposed maneuver (R. 31, 33, 34, 42). The tug and tow began swinging to starboard, but of necessity her swing was slow due to the heavy tow and slow speed at which the tug was proceeding.

Hudgins watched the LILLIAN ANNE closely. Her red light moved across the tug's bow until it was on her port bow (R. 43), which satisfied Hudgins that the LILLIAN ANNE was swinging to her starboard, also, and doing what she was required to do to safely carry out the proposed passing. When the LILLIAN ANNE was a short distance off, she steadied up, and Hudgins thought she was crowding the scow—trimming her too closely—so he gave her a second one blast signal to which no reply was received (R. 32, 33, 34, 43, 50). In a matter of seconds thereafter, when it was observed the LILLIAN ANNE was not heeding the tug's second one whistle, but on the contrary was swinging in more toward the scow, the tug's engines were reversed and the backing whistle—three short blasts—was sounded to advise the LILLIAN ANNE (R. 34, 43, 44). The reverse action of the tug's engine swung the tug's bow to starboard (R. 44, 45). The LILLIAN

ANNE was also reversing and since the LILLIAN ANNE had a left handed engine, the effect of a full speed astern on her engines was to cant her bow to port and into the scow (R. 96).

The LILLIAN ANNE struck the scow head-on near her port forward corner, damaging her so severely that she sank within five minutes. When the impact came, the tug and tow had lost all headway and they had swung about three and a half points to starboard (R. 162, 35).

The only signal heard from the LILLIAN ANNE was the one whistle initiating the port to port passage (R. 33).

After the collision the LILLIAN ANNE backed quickly off and passed on down the river without speaking to the tug.

Hudgins summed up the circumstances leading up to the collision in this brief and expressive language:

> "A. I think I know, sir, what was required. When I got that man's whistle, his one-blast signal, it was my duty to answer it, wasn't it?
>
> Q. Go ahead.
>
> A. I did so and I gave him just what he asked for. I righted my wheel. He swung, and I swung to the port passing and everything looked all right, looked clear, and I said, 'Everything will be all right', and he straightened himself up on me, you know, and I blew him another. I said 'Look here, you are not pulling off enough', and I never heard no answer, and it was close then." (R. 50)

Not only does the libellant, The R. C. Huffman Construction Company contend that there were two

white lights on the scow, but in addition every witness in the case, including the two neutral witnesses, Jones and Whitehurst, testified to this. Only those on the LILLIAN ANNE testified to the contrary. One of these lights was on the forward port corner of the scow and the other on the stern on top of the pump house. (R. 158). Both were visible to vessels approaching from ahead (R. 167, 164, 169, 170, 171, 216, 217, 186).

## IV. ARGUMENT

### A. THIS CASE CONCERNS QUESTIONS OF FACT ONLY.

The District Court, before whom every one of the seventeen witnesses in this case, testified in person, held that the collision was caused solely by the negligence of those on the LILLIAN ANNE in failing to keep a vigilant lookout and in proceeding at a rate of speed excessive under the circumstances then existing, and in failing to see the scow until the vessel was almost on top of it (R. 5, 8, 9). The Circuit Court of Appeals affirmed this holding. Every single charge of negligence against the tug and scow now asserted in this court by the petitioner was argued at great length in both of the lower courts, and after the most careful consideration there, decided against the petitioner.

In these courts the petitioner accused the tug of the following negligence:

(1) In not having a competent person in charge of the tug.

(2) In that those on the tug did not see the LILLIAN ANNE until it was too late to avoid the collision;

(3) In that the tug disregarded the rules of navigation;

(4) If it were a crossing case, the tug was still at fault;

(5) The tug was at fault for not properly placing her lookout;

(6) The scow was improperly lighted, if at all;

(7) There was a duty on the tug to blow danger signals and to go astern sooner than she did.

All of these accusations as *matters of fact* were decided adversely to the petitioner. Yet here in this Court we find petitioner asserting them again. The evidence clearly supports the findings of the courts below. Indeed, a contrary conclusion would be in the very teeth of the evidence.

Petitioner refers in her petition to admissions of fault made by the mate of the tug. There were no such admissions. She likewise states in her petition that "there was no dispute of fact on the question of the negligence of the tug FAIRWILL". Obviously this, too, is untrue. If it were true, it would be quite difficult to explain the actions of the District Court and the Circuit Court of Appeals, both of whom have held the tug entirely free from negligence, and have placed the blame for this collision entirely upon the petitioner.

Petitioner apparently expects this court to consider this matter for two reasons.

She claims, first, that the decisions of the two lower courts are of an important maritime question of local application conflicting with the applicable decisions, and secondly, that these decisions have, so far departed from the accepted and usual course of judicial procedure as to call for the exercise of this Court's supervision.

The trouble with petitioner's reasoning is that she shows no conflict with applicable decisions, and no departure from the usual course of judicial procedure *except by adopting the testimony of her witnesses only, and excluding the testimony of the tug's and other witnesses.*

In other words, there was no dispute as to the law; only a series of disputes as to the facts, all of which have been decided adversely to the petitioner.

The petitioner says, for instance, that the mate in charge of the tug was incompetent. The District Court and the Circuit Court have decided he was competent.

The petitioner says that those on the tug did not see the LILLIAN ANNE until too late to avoid the collision. The two lower courts say that those on the tug saw the LILLIAN ANNE at or before those on the LILLIAN ANNE saw the tug, when there was plenty of time to maneuver for a port to port passage, and that the collision was caused by the failure of the LILLIAN ANNE to properly carry out that agreed maneuver.

And so on as to every single charge of fault made here as to the tug.

It is well settled that this court will not reverse a finding of fact where there is substantial evidence to

support such finding (*The Abbotsford,* 98 U.S. 440; *Benson Mining Company v. Alta Mining Company,* 145 U.S. 428, 434; *Egan v. Hart,* 165 U.S. 188; *Davis v. Schwartz,* 155 U.S. 631, 638; *German Savings Society v. Dormitzer,* 192 U.S. 125, 129) even though the evidence be conflicting (*Louis. & Nash. R.R. v. United States,* 238 U.S. 1, 10, 11).

Petitioner invokes the rules of *The Pennsylvania,* 19 Wall. 125, where it was held that a vessel having violated a statutory rule intended to prevent collisions, must uphold the burden of showing that the violation could not have been a contributing cause of the collision.

Neither the District Court nor the Circuit Court of Appeals has disputed the validity of this decision, nor was there any departure, therefrom.

These courts held that the tug had sustained the burden of establishing that whatever slight violations of statutory rules there may have been on her part, were not contributing causes of the collision, which is exactly in conformity with the rule laid down in the *Pennsylvania* upon which petitioner is relying.

Petitioner claims, for instance, that the lookout on the tug and scow was improperly placed, and cites several cases to support this proposition, including *N. Y. P. & N. Co. v. Wilkins,* 257 Fed. 42, a case from the Fourth Circuit. The District Court, however, decided that since the lookout on the tug sighted the LILLIAN ANNE in ample time, this alleged fault could not have contributed to causing the collision (R. 8, 14). The Circuit Court of Appeals concurred

in this. (R. 281, 282). These two courts are amply supported in this conclusion by such cases as:

*The Farragut,* 10 Wall. 334, 338; 14 Led. 946;
*The Dexter,* 23 Wall. 69; 23 Led. 84;
*The Pocomoke* (E.D. Va.), 150 Fed. 193, 198.

Again there was no departure from the accepted cases; merely a decision of fact which made the rule in *The Pennsylvania* inapplicable.

We respectfully submit that the real questions in this case are all fact questions.

That there was substantial evidence to support all of these findings will be shown in what follows in this brief.

Of necessity, our argument on these numerous fact questions must be detailed because our opponents have made their charges in detail, and we must answer them in like manner.

### B. ALL OF THE QUESTIONS OF FACT WERE DECIDED AGAINST THE PETITIONER AND THERE WAS AN ABUNDANCE OF EVIDENCE TO SUPPORT THIS ACTION OF THE LOWER COURTS.

#### (1) The mate Hudgins was thoroughly competent.

Our opponents have gone to great lengths in their efforts to paint a picture of George K. Hudgins, the Mate on the FAIRWILL, as the very acme of incompetency. However, the conclusions they have reached are not proper inferences from the facts proven. Wher-

ever an unfavorable inference may, by some strained construction of the facts, be drawn, they have drawn it. We are confident that this Court will not be mislead by these tactics.

Hudgins was a resident of Matthews County, Virginia. He had a Second Mate's and Pilot's license for an extensive territory. He had had these licenses for thirty-five years. (R. 38). He had no license for Norfolk Harbor.

For fourteen years he had been employed navigating passenger vessels of the Merchants and Miners Steamship Company plying between Norfolk and Boston and Providence, Rhode Island. He had served on these vessels as sailor, quarter-master and second mate. (R. 38, 39). He had been second mate for seven or eight years. After he left the Merchants and Miners he had engaged in operating fishing boats, vessels about 70 feet long. He owned such a boat and navigated it.

At the outset let us state that no license of any kind is required for masters of diesel tugs. Hutson, the Master of this tug didn't have one. Millard Gray, who was in charge of the tug did not have one. A canvass of the diesel tug masters in Norfolk Harbor would show that the vast majority of them have no license because the law does not require it. Consequently, no unfavorable inference can be drawn because Hudgins' license did not cover Norfolk Harbor.

*The Inland,* 45 F. (Supp.) 265, cited by petitioner, concerns a situation where the master of the tug had no license at all and the Court said "that might indicate a lack of experience". We assume that if testimony had been introduced in that case, as in the instant case, show-

ing affirmatively that the master had had considerable experience, that even in that case, the lack of a license would have not been considered. But, of course, the case is not in point at all because the mate in the instant case did have an extensive license and a great deal of experience, which facts totally differentiate the instant case from the case cited.

The insinuation is made that because Capt. Hutson selected Millard Gray as the man in whose charge he would leave the tug, that Hutson had no faith in Hudgins. This is entirely unfounded. Gray himself said that the Captain had told him he had selected him because he wanted Sanders, the owner, then in Florida, to be satisfied. (R. 221, 222).

Gray had been in charge of the tug on other occasions, and Sanders had considerable confidence in him. He had been in Sanders' employ for a long period. (R. 211, 212). Hudgins was quite unknown to Sanders. He did not remember even having met him. (R. 228). What was more natural than for Hutson to select Gray, a selection he knew Sanders would approve! But this selection did not mean that he thought Hudgins incompetent. In fact he knew that Hudgins would be in sole charge of the navigation of the tug when he was on watch—just as he had when Hutson was himself on the tug. Apparently Hutson had confidence in Hudgins.

As pointed out by the petitioner, he had had no extended experience in the lower harbor of Norfolk, and no experience in navigating a tug boat before his service on the FAIRWILL. These seem to be the principal facts upon which the charge of incompetency is based.

However, the navigation of a tug is subject generally to the same rules as the navigation of any other vessel. It is, after all, *navigation*. There is no peculiar art in the navigation of a tug. She has a whistle, an engine and a rudder, just as other vessels have. The faults charged against this mate, to-wit: lookout, backing, alarm signals, if proven and if material, would have been faults on a larger vessel.

But in addition, this mate had stood his regular watches for 21 days on this same tug. She operated the full 24 hours without stopping. (R. 40, 41). If she made an average of three round trips in 24 hours and he was on duty one-half of the time, he had stood at the helm of that tug navigating the same tug and the same scow over the same course for 31 round trips in daylight and at night, in all kinds of weather, back and forth, between the Dredge at the Ford Plant and Craney Island. In all of this time he had had no trouble of any kind. He not only had in this experience sufficient to give him a good working knowledge of the lower harbor of Norfolk, and of handling tugboats and barges in general, but he also knew how to handle on this course this particular tugboat and this particular scow. All boats have their peculiarities.

And this experience was, we submit, ample to acquaint him with the harbor insofar as the course the tug was following was concerned. He may very reasonably not have known where the sections of the harbor were by name. Just as he was unable to identify the Southern Branch by name on the chart. But that by no means indicates that he did not know where custo-

marily the heavier flow of traffic came from, as he had observed in his 21 days of experience.

He could not glibly reply to questions regarding certain navigational rules when he was asked to recite them by article and number. But he was not deficient in a knowledge of these rules when he was able to identify the rule being discussed. He had an instinctive knowledge of seamanship which was entirely sufficient in itself. He had no trouble in understanding what the LILLIAN ANNE desired. He promptly answered her signal, starboarded his wheel and in every way handled the situation, in a manner which, in our opinion, was not subject to criticism.

Our point is that this man was honest and instinctively skilful, despite the fact that under the wily questioning of extremely able admiralty attorneys, he became easily confused and was slow to catch the point, and awkward in escaping a trap.

Proctor for petitioner makes the point-blank statement on page 13 of his brief that this man's eye-sight and hearing were bad. Yet the very reference given to support this statement (R. 27) shows that all the mate had said was that he had been ill shortly before the trial and that his hearing was not then good and his eyesight was not as good as it had been. The case was tried on October 23-25, 1944 and the collision happened on November 5, 1942. The mate testified positively that his hearing was all right at the time of the collision (R. 33) and no one asked him in regard to his eyesight. However, we submit that his alert sighting of the LILLIAN ANNE and his account of her movements after he sighted her was proof of the fact that his eyes

were all right. It is worthy of note that the District Court was of the opinion that he sighted the LILLIAN ANNE before Gatewood, who with Martin, was in the pilot house of the LILLIAN ANNE, sighted the tug. (See Opinion R. 5).

We plead guilty to the charge made by Proctors for Petitioner that Hudgins was an elderly man (p. 13). But we submit that this does not mean that he was not a competent navigator.

Nor can we agree that the reason Hudgins said "Call me by name. I never was Captain in my life" (R. 54) indicated, as petitioner argues, a consciousness of shortcoming. Hudgins was a simple uneducated man who had never attained the grade of captain. His rank was Second Mate, and it irritated him to be addressed by a title which did not belong to him.

Proctor for petitioner closes his attack on Hudgins with the sentence, "After the collision, the engineer, Gray, took over the navigation" (p. 14). In the lower court he argued that this was evidence that Gray thought Hudgins was incompetent and would no longer permit him to navigate the tug.

However, this is just another strained inference. Gray says that there was some doubt as to who navigated the tug for the remainder of the voyage to the dredge. He thinks both he and Hudgins had a spell at it (R. 220). But Hudgins had completed his watch at 6 A.M. and he was only handling the wheel in order to allow Gray to get his breakfast, and if Gray did resume his position at the wheel, the procedure was only a routine one. (R. 37, 41).

It is quite difficult for us to put on paper the very definite impression which Hudgins made on everyone in the court room except our opponents, that he was a truthful, experienced navigator. However, we point to the fact that the Judge of the District Court had the opportunity to observe this man's demeanor and watch his reactions to the questions asked, and that he has indicated his belief in what Hudgins said by his decision of this case, and that he did this in the face of the very same arguments now being made by our opponents.

**(2) The mate on the tug saw the LILLIAN ANNE in ample time, and, therefore, the position of the lookout has nothing to do with this case.**

Our opponents argue that the mate on the tug did not see the LILLIAN ANNE until she was 75 or 100 yards from the tug. They argue also that the lookout on the tug was improperly placed. Proctor for petitioner says he should have been placed on the end of the scow.

The fact has been determined to be, however, that Gatewood on the LILLIAN ANNE, and Hudgins on the tug, saw the tug and motor vessel, respectively, at very nearly the same moment and at a distance of either 400 or 500 yards or more, as Hudgins stated (R. 42), or at a distance of 800 yards or more, as Gatewood said (R. 87), the exact measured distance depending on which of these two men more accurately estimated the distance, and at any rate at the time when the LILLIAN ANNE blew her one whistle signal (which

was the only one whistle signal blown by her), and we submit *that the whole argument as to the position of the lookout on the tug collapses.*

We say this because we think that all parties will admit the well established principle of law that if those on a vessel sight an approaching vessel seasonably, the question of where the lookout is stationed becomes utterly and entirely immaterial.

The mate testified that he saw the LILLIAN ANNE at a distance of 400 or 500 yards (R. 42).

Petitioner's Proctor says at page 14 of his brief:

> "His (Hudgins') attention was then directed to the testimony which he had given before the U. S. Inspectors, under oath, less than a month after the collision at which time he swore to the fact that this distance between the two vessels was only '75 or 100 yards' ".

However, this is not a fair statement of what actually happened. Hudgins himself voluntarily brought out the fact that he had made a mistake in his testimony before the inspectors in regard to his distance, and Hudgins did this at the very first mention of this distance in the trial of the case. (R. 27). He further stated that five minutes after he had so testified and after the Inspectors' hearing was completed, and he had had time to think it over, he realized that he had made an error in estimating this distance as such a short one; that in view of the whole situation and what happened therein, the distance must have been greater—at least 400 or 500 yards, and perhaps more. (R. 42). He was certain the distance was ample for passing and sufficient to avoid a collision. (R. 49).

It is hardly fair to say to this sea-faring man, "You are guilty of negligence. It is true that you saw the LILLIAN ANNE at a sufficient distance to allow a safe passage. But when you first estimated this distance, you erred. It is now too late to correct that regardless of what the truth is. You are guilty of negligence in not having a proper concept of distance measured in yards." Yet, this is what proctor for the LILLIAN ANNE is saying to him.

But there is the strongest kind of admitted evidence which shows that the mate saw the LILLIAN ANNE at a far greater distance than 75 or 100 yards.

The mate testified that what first attracted his attention to the LILLIAN ANNE was her one whistle signal, that he saw her lights at the same time he heard the one whistle. (R. 31). He answered this one whistle signal promptly with a one whistle from the tug. (R. 31, 42). Now certainly he had seen the LILLIAN ANNE when he did this. He was not blowing the tug's whistle just for fun.

But when Gatewood blew his one whistle he said *at that time* the FAIRWILL was 800 yards or more from the LILLIAN ANNE. He blew the whistle simultaneously upon sighting the tug, (R. 77) and the distance was *then 800* yards.

But this was exactly the same moment when the mate saw the motor vessel. The difference is merely one of estimation. The mate estimated the distance at 400 or 500 yards, and Gatewood at 800 yards, and Martin at 750 yards (R. 199). In any event, it was an ample distance.

And like the parts in a picture puzzle comes the testimony from Gatewood that immediately after he blew that one whistle (the only one whistle he blew) he directed his course to the starboard (R. 92), and the confirming testimony from the mate that immediately after the exchange of whistles he noticed the LILLIAN ANNE turn to the starboard (R. 42, 43).

Jones was sitting on the Wood Towing Company's dock awaiting the arrival of the tug HELEN of the Wood Company upon which he was then employed (R. 184). What first attracted his attention was a one whistle signal from the FAIRWILL. (R. 188). At this time he said the LILLIAN ANNE was coming from the general direction of Southern Branch, and the FAIRWILL was headed towards Eastern Branch. (R. 120, 188).

After the first one whistle signal from the FAIRWILL, he said he heard a second one whistle signal from the FAIRWILL (R. 189), and to neither of these was there any reply from the LILLIAN ANNE, nor any slackening of her speed (R. 190, 191); that he next heard a three whistle signal from the tug and could see that she and her tow were backing (R. 190); then almost at the time of the collision or immediately before, he heard a three whistle signal from the LILLIAN ANNE. (R. 190, 191).

If we were to believe Gatewood, we would have the LILLIAN ANNE blowing not one set of backing whistles, but two, one at 600 feet from the FAIRWILL and one in answer to the FAIRWILL's three whistles. (See log of LILLIAN ANNE). (R. 145).

In the lower court proctor for Huffman in his brief filed therein, calculated that if the tug were proceeding at two miles per hour and the LILLIAN ANNE at eight miles per hour, they would traverse the space of 75 to 100 yards in less than one-half a minute.

But proctor was conservative when he said "less than one-half a minute". Actually, if the tug were proceeding at two miles per hour and the steamer at eight miles per hour, then the combined speed was 880 feet per minute, and *they would meet in 21 seconds.* If the LILLIAN ANNE were proceeding at four and one-half miles per hour, as Gatewood testified, and the tug at two miles per hour, they would be coming together at the rate of 605 feet per minute, and they would traverse 100 yards in just 30 seconds.

Yet in this brief period of "less than one-half a minute" petitioner would have this Court believe that all of the whistle signals which the witness, Leroy Jones, has testified to, were blown, and all of the engine signals and engine movements were made. If the LILLIAN ANNE blew a one whistle signal and the FAIRWILL blew two one whistle signals, the LILLIAN ANNE blew one or two three whistle signals, and the FAIRWILL blew one three whistle signal, *the air surely must have been full of whistles.*

We have Captain Gatewood as an authority that it takes time to sound whistles, ring bells and telegraphs. (R. 93).

The obvious answer is that the vessels were not just 75 or 100 yards apart when Hudgins first sighted the LILLIAN ANNE; that they were a much greater

distance apart, and that all of these whistle signals did not occur almost simultaneously but were spaced over a much greater period of time than "less than one-half a minute".

We have deliberately recited the testimony as to the whistles from the mouth of Leroy Jones because he was not a member of the crew of the FAIRWILL, or even aboard her.

But if we turn to Hudgins' own testimony and recall that he said he first received a one whistle signal from the LILLIAN ANNE, that he immediately answered this with a one whistle signal, and directed his vessels to the starboard, and then watched the LILLIAN ANNE, noticed that at first she seemed to be turning to her starboard but then appeared to be steadying up, whereupon the vessels still not being in danger of collision, he blew as a warning a second one whistle signal, and received no answer, and the LILLIAN ANNE continued her steadying up, whereupon he blew backing signals and put his vessel astern and had completely killed the tug's headway and possibly she was going astern at the time of the collision—we know that all of this could not have been done within "less than one-half minute". Yet we have Huffman's mathematical calculations that the vessels were approaching at 880 feet a minute, and if they were 75 or 100 yards apart, less than 30 seconds would elapse to cover that space. Again the answer is that they were a far greater distance apart.

Martin, the mate on the LILLIAN ANNE, said that between the time Gatewood sighted the tug and the collision a period of 3½ to 4 minutes elapsed. (R.

204, 205). Leroy Jones says that 3 or 4 minutes elapsed between the tug's two one whistle signals. (R. 189). All of this suggests a substantial period of time between the first one whistle signal, when Hudgins sighted the LILLIAN ANNE and the moment of collision, and with the vessels' combined speed being between 700 and 900 feet a minute, we know that the mate sighted the LILLIAN ANNE at at least 500 yards.

Petitioner argues on pages 16 and 17 of his brief that Eugene Hudgins came on the deck of the tug when a one whistle signal was blown and that at that time the LILLIAN ANNE was very close to the tug. Shortly after this one whistle signal the three whistle signal was blown. He says, "Remember that this is the one blast signal from the tug which mate Hudgins says he gave when he first observed the LILLIAN ANNE".

But this is not the fact, and the argument is faulty in that proctor has seized on the wrong one whistle signal. Hudgins testified positively that he blew two one whistle signals. (R. 34). The first one whistle signal was blown in reply to the LILLIAN ANNE's one whistle signal and very close to the time that Hudgins first sighted the LILLIAN ANNE, after which he watched her closely, noticed that she first went to starboard, and then began cutting in towards him, whereupon he blew a second one whistle signal. This was the signal which brought Eugene Hudgins to the deck of the tug, and of course very shortly thereafter the tug blew its three whistle signals.

If we were to accept proctor's theory on this point we would have the tug blowing only a single one

whistle signal. But we know this is not the fact, not only from what Hudgins (R. 34), Merritt (R. 210), and Gray (R. 214) said, but also from the testimony of Jones (R. 188, 189). And we know that Eugene Hudgins heard the second one whistle signal because he came out on deck just before the backing whistle, and when the vessels were close together.

Exactly the same comment may be made in the reference to the testimony of Thurman Woodard on page 18 of the Petitioner's brief. The whistle which he heard "just as he was starting out of the engine room" was the second one whistle signal, not the first one, and the vessels were then comparatively close together.

On page 24 of the Petitioner's brief it is argued that the scow was a dark object discolored by mud, and that due to the fact that it had a free-board of 8 or 10 feet, it formed an obstruction to anyone looking from the tug. There was no evidence that the scow was discolored by mud. There was positive evidence that the mate in the pilot house of the tug could see all around the horizon and over the scow. (Whitehurst, R. 178).

There is absolutely no justification for the conclusion drawn by petitioner that this one blast whistle was in no sense the regular loud signal. He has picked this conclusion out of the thin air.

Perhaps we ought also to comment on the remarks regarding the refusal of the lower court to admit into evidence the affidavit of George K. Hudgins. This was not offered until long after the trial had been completed and the opinion of the lower court filed. Proctor for Huffman had it in his file at the trial but apparently

did not think it worth while to then introduce it. The lower court rejected it because it was an unsupported affidavit not offered to Hudgins as a witness to contradict him, but simply as an affidavit. However, our opponents have referred to it in their brief as though it had been introduced into evidence.

We respectfully submit that the District Court was fully justified in holding in its Findings of Fact number 7 that Hudgins saw the LILLIAN ANNE in ample time (R. 14) and that the Circuit Court of Appeals was justified in affirming this holding.

**(3) The Tug disregarded no navigational rules.**

Petitioner argues that the tug violated Article 18, Rule 1, of the Pilot Rules.

The LILLIAN ANNE had blown a single blast indicating a port to port passage, and the tug had promptly answered this with a single blast expressing agreement in the port to port passage. It then became the tug's duty to go to her starboard. This was exactly what she did. (R. 42, 35).

Petitioner claims the tug went to the port and crossed the LILLIAN ANNE's course. She made the same claim in both the District Court and the Circuit Court of Appeals. Both of these courts decided against the petitioner.

Much of the petitioner's difficulty on this point springs from her insistence that the collision occurred off the Chesapeake Steamship Company's dock, and just as the tug was making her turn towards Eastern Branch. But the great weight of the evidence is that

the collision occurred off the Wood Towing Corporation's dock and long after the tug had made her turn towards Eastern Branch.

The District Court held that the collision occurred off Wood's Dock (R. 6, 12), and the Circuit Court of Appeals refused to disturb this finding (R. 280, 281).

We can see no reason to repeat all of the detailed argument on this point. It is just one more question of fact decided against the petitioner in the two lower courts, and the holding on which will not ordinarily be disturbed by this Court.

**(4) This case is not a crossing case, and even if it were, the tug did everything it could to avoid collision.**

Proctor for petitioner, during his examination of Hudgins, the master of the tug, touched on Article 19 of the Pilot Rules, the so-called "crossing rule".

Admittedly, the case was not a crossing case. Both the District Court and the Circuit Court of Appeals held that the vessels were on meeting courses, not crossing courses (R. 7, 13, 279, 280).

Petitioner, in her answer, alleged that it was a passing case. (R. 148). Gatewood testified under oath that it was a passing case. (R. 96, 99). His action in blowing a one whistle, and in directing his course to starboard would have been utterly inconsistent with a crossing case where the one whistle would have been unnecessary and misleading, and where the absolute duty would have rested on him to hold his course. There was no dispute that the LILLIAN ANNE

struck the scow head-on, and not at right angles. (R. 94, 202).

It has been repeatedly held that the starboard hand rule has no application to vessels meeting in a channel although at some time, due to a bend in the channel course, their respective headings were such that their courses, if prolonged, would cross; that the course of a vessel is its apparent course and not her bearing at any given moment. *The Victory v. The Plymothian,* 168 U.S. 410, and particularly at page 418.

But even if this were a crossing case, we cannot see that the navigator of the tug could have done anything other than he did. He put his helm to the starboard immediately upon sighting the LILLIAN ANNE, and he maintained his speed for headway only. Since the speed was only 2 miles per hour, and he had a heavy scow in tow, he would have lost control had he immediately stopped. He did the very thing which the HAVEN BELLE did in the case cited by petitioner, *The Haven Belle and The Seminole,* 85 F. (2) 939, that is "to steer her course to the starboard and pass under the stern of the SEMINOLE", and the Court in that case approved that course (p. 941). In addition, he did everything he could to keep clear, and he would have done so, had the LILLIAN ANNE not cut into the scow.

**(5) The scow was properly lighted, and the proximate cause of the collision was the failure to keep an alert lookout on the LILLIAN ANNE.**

Practically every member of the crew of the FAIRWILL testified that there were two lanterns on the scow, one on the forward port corner against the combing, and one on the starboard on top of the pump house. These lanterns showed for a distance of five miles. They stood at least eight feet above the surface of the water, and they should have been seen by those on the LILLIAN ANNE. (R. 109, 110, 55, 217). But the crew of the FAIRWILL were not alone in testifying that these lights were properly placed and lit and showing brightly.

Woodard, an employee of the Huffman Construction Company, who had charge of the scow for that Company, testified that it had two lanterns in good condition, burning bright, visible at a distance of four or five miles; one of them was forward near the port bow corner of the scow, and the other was aft on the top of the pump house. (R. 158, 159). After the collision he used the forward lantern to examine the damage to the scow (R. 166, 167) and to go down into her hold (R. 167). He then put it down on the deck, and when the scow sank, he saw both lanterns still burning brightly as she sank (R. 166, 167). He remembered a conversation between himself and Graham Whitehurst, the Government Inspector, in which the latter asked him why he didn't retrieve the lantern (R. 167). So also does Graham Whitehurst (R. 171).

Whitehurst's testimony and that of Woodard have every earmark of a definite recollection.

Woodard testified that the forward lantern could be seen by a vessel approaching from any angle in front of the scow (R. 167).

Graham Whitehurst, who had no connection with either vessel, and who was on the FAIRWILL merely to discharge his duties as a government inspector, told in considerable detail the exact position of the lights on the scow, and reiterated that they were brightly burning and could be seen for a distance of four or five miles (R. 169, 170).

Leroy Jones, who also had no connection either with the tug or the LILLIAN ANNE, and who at the time he testified was employed as a deck hand on a Pennsylvania Railroad steamer, corroborated what Whitehurst had said about these lights. At the time he saw the collision he was sitting on the Wood Towing Company's dock waiting for the Tug HELEN upon which he was then employed. He not only was utterly unbiased, but in addition he had a ringside seat. He said the scow had two white lights, one on the bow and one on the stern, both burning brightly (R. 186, 187).

Turning from this overwhelming evidence we find Captain Gatewood and Mate Martin, of the LILLIAN ANNE, asserting flatly that not only did they see no lights on the scow at a distance of 800 yards, but *that they never saw any lights on the scow even after the collision at a distance of four feet.*

Couple this with the amazing fact that the evidence from the neutral witnesses and from the witnesses on the LILLIAN ANNE was that the bow of that vessel

hit so close to the point where the forward lantern was that this lantern was overturned by the blow, and we have a situation where lack of alertness has certainly been proven (R. 166).

See The Transfer No. 8 (D.C.), 14 F. (2) 448, 452 (C.C.A. 2d), 25 Fed. (2d) 628, 629, where it was held that the fact that an approaching vessel struck at the point where the light was located, was strong evidence of a lack of alertness.

When we find Gatewood and Martin asserting that Gatewood was keeping a close look-out as the LILLIAN ANNE approached the tug and scow, and yet didn't know that the scow was ahead of him until the LILLIAN ANNE was almost on top of her (Gatewood said he first saw the scow at a distance of 25 feet), (R. 101), we are forced to one of two conclusions, the charitable one of which is that neither Gatewood nor Martin were alert, and Gatewood was certainly not watching out ahead of him; that the noise and confusion created by the passengers drowned out the sounds from other vessels.

The LILLIAN ANNE had aboard 261 officers and sailors (R. 60). Although Captain Gatewood tried to claim that he did not allow these men forward of a line abreast of the pilot house (R. 61), it developed from Underwood, a member of the crew of the LILLIAN ANNE, that the line was not abreast of the pilot house but 6 feet in front of it (R. 241, 242). Gatewood himself admitted that these sailors were noisy both before and after the accident when he was questioned as to why he did not put a lookout in the bow, and to which he answered because "on my boat you

couldn't hear anything with the men hollerin' and carrying on * * *" (R. 86). If it was too noisy for the lookout on the extreme bow, 28 feet from the pilot house, it is not unfair to conclude that it was noisy around the pilot house and that his attention was directed to these sailors, and that for this reason, he did not see the scow, nor hear the tug's whistles, nor accurately judge the course of the tug by her lights.

Here was a situation where both Gatewood and Martin admitted that they saw the towing lights on the tug; admitted that this meant that the tug had a tow alongside—not a tow on a hawser astern (R. 96)—and claimed that the tug was turning to port across the bow of the LILLIAN ANNE in violation of the port to port passage agreement. For these very reasons, they should have been on their toes, alert, watching for every evidence of the position of the tow, and yet they never saw the scow until the LILLIAN ANNE was on top of it.

The bow was the proper place on this vessel for stationing the lookout. The bow was 28 feet from the pilot house and at least 22 feet from the 261 sailors and their laughter and shouts. Besides the LILLIAN ANNE had a slight flare to her bow (R. 86), which might to some extent have blocked the view of one in the pilot house, of comparatively low lying objects on the water, such as the scow, but which could not block the view of one standing on the very tip of the bow of the steamer.

Columbus Underwood, for instance, standing only three feet in front of the pilot house of the LILLIAN ANNE clearly saw the scow at a distance of twelve

hundred feet (R. 240). Yet Captain Gatewood, in the pilot house, saw it at a distance of only 25 feet (R. 101).

It is hard to believe that at 6:40 A.M. on November 5th, with the weather clear and the visibility good, there was not sufficient light, with day breaking, for a pilot, alert and watchful, to have seen the scow, lanterns or no lanterns. We say this despite the fact that admittedly 6:40 A.M. was war time and not Eastern Standard time.

Graham Whitehurst, the government inspector, testified that he had no difficulty in seeing the outlines of the LILLIAN ANNE (R. 182). Leroy Jones, another impartial witness, said that it was just about daybreak (R. 184). Eugene Hudgins confirmed this (R. 110). Yet Gatewood and Martin insisted it was pitch black (R. 85, 127). The former testified on the subject of the lights: "Absolutely no light on the scow whatsoever, absolutely and positively" (R. 87). He said "If I had seen the scow I would have missed it" (R. 94, 95), and that if the scow had had lights on her he would have seen them (R. 95). But although he is now placing the sole cause of the accident on the failure of the scow to have lights, yet when he wrote into his log an account of the occurrence of this accident five minutes after his vessel had left the scene (R. 64, 101, 102, 145) and when the facts should have been fresh in his mind, he gave every detail leading up to the collision — all the whistles and bell signals and engine movements of the LILLIAN ANNE and the courses of the respective vessels *except the failure of the scow to have lights.*

When it is considered that a log entry written shortly after a collision is the master's own story of how the collision occurred, usually written with a studied effort to place his vessel in the most favorable light possible, it is amazing that Gatewood should have left out of his log account that feature of this collision which he now says was its sole cause.

We think it is fair to state from all that has been said above, that the alleged lack of lights on the scow was an after thought.

As further confirmation of the lack of attention being paid by those on the LILLIAN ANNE to the approaching tug FAIRWILL and the Scow 72-H, there is the uncontradicted fact that those on the LILLIAN ANNE did not, on their own admissions, hear either of the one whistle signals from the tug. Yet these signals were blown. The mate on the tug said he blew these signals. Practically everybody on the tug heard the second one-whistle. Leroy Jones, sitting on the dock, and Gray and Merritt (R. 210) on the tug, heard both of them clearly. Graham Whitehurst, E. Hudgins, and Woodard heard the second one-whistle. Yet no one on the LILLIAN ANNE heard either one-whistle signal. *Surely their attention was otherwise directed.*

Proctor for petitioner claims that the lanterns did not conform to the rule because the bow light did not show all around the horizon. But it certainly showed in the direction from which the LILLIAN ANNE approached, and this is sufficient. See *The Transfer No. 8, supra.* Witness after witness testified that this bow light could have been seen from any angle by a vessel

approaching from the bow as was the LILLIAN ANNE. The aft light was on the pump house on the stern near the center (R. 158). Proctor for Gatewood says it should have been in the corner, but nothing in the Rule which he himself quotes on page 19 of his brief, requires this.

We submit that the District Court's conclusion in its opinion and findings of fact No. 7 that the LILLIAN ANNE was at fault for not having a look-out properly placed and alert, was fully justified (R. 5, 14). The Circuit Court of Appeals upheld this finding (R. 280).

**(6) There was no duty on the tug to blow danger signals or to go astern sooner than she did.**

Petitioner argues that the tug should have reversed immediately when the mate on the tug saw the LILLIAN ANNE.

The distance at which he saw the LILLIAN ANNE was either four or five hundred yards, as he estimated it, or eight hundred yards as Gatewood estimated it. In no event was it seventy-five yards as stated by petitioner.

But petitioner says it makes no difference as to the distance, still immediately upon sighting the LILLIAN ANNE, the FAIRWILL should have reversed.

The very statement of this proposition shows its absurdity. Here are two vessels a long distance apart, the width of the harbor apart, one of them proposes a port to port passage which is perfectly feasible, the other assents and goes to starboard. There is nothing

in this situation to cause the second vessel to suddenly reverse and blow danger signals.

Although petitioner insists that the tug's engine was crippled, and insinuates that it did not have its usual power and could not control the scow, this was not true.

Both Whitehurst (R. 179) and Merritt (R. 206, 207), the engineer on the FAIRWILL testified positively that the trouble with the spray nozzle on the FAIRWILL had absolutely nothing to do with the effectiveness of the engine, either in backing or in going forward; that it was operating with its full force and power; that it had been slowed down merely to enable Merritt to more easily work on the engine; that the trouble was of a minor nature, first showing up in the form of a knock in the engine after the tug left Craney Island, and clearing up of itself before she reached the dredge.

Nor can we see why the tug upon seeing a red light a fifth to a half a mile away, should blow a danger signal, as petitioner argues.

Gatewood said there was no danger until the vessels were 600 feet apart (R. 87, 88).

The danger signal rule is usually resorted to when there is a misunderstanding.

But Hudgins did not misunderstand either the course or the signals of the LILLIAN ANNE. He had encountered the LILLIAN ANNE on what everybody admits was a meeting course (R. 41, 42). The LILLIAN ANNE had proposed a port to port passage (R. 42) by blowing a one whistle signal, to which he

had assented, and he had put his helm to the starboard. He then saw the LILLIAN ANNE turn to starboard also and show him her red light. There was nothing alarming in this. He watched the LILLIAN ANNE closely and he said she appeared to be swinging to her port and trimming him too close (R. 43). He blew a second one blast "to notify him that he is trimming me too close" (R. 43). But even then he thought she would pass clear. However, she continued to swing in toward the scow, and Hudgins put his engines full astern and blew three whistles to inform the LILLIAN ANNE as to what he was doing.

There was no misunderstanding in the beginning with both vessels following the requirements of a port to port passage. Up to the time the LILLIAN ANNE began to turn rapidly into the scow Hudgins was fully justified in believing that she would pass clear, and Gatewood admitted that had he turned to the starboard 20 feet when he was 100 feet from the scow, he would have missed the scow (R. 94, 95).

We know now that when the LILLIAN ANNE put her engines full speed astern this threw her bow to the left and into the scow (R. 82). We know also that the engineer on the LILLIAN ANNE gave her all she had on this maneuver regardless of damage to the engines (R. 226). The District Court thought that this full speed astern on the motor vessel's engines was the immediate cause of the collision. (See Finding of Fact No. 6, R. 13). And this seems most logical to us. Odd as it may seem, this collision might have been avoided had the LILLIAN ANNE cut down on her speed and

not reversed her engines, and thus maintained her course (R. 14).

But was the mate on the tug to be charged with knowledge of everything that was in Gatewood's mind, or which ought to have been in his mind, as the LILLIAN ANNE approached the FAIRWILL? He certainly did not know that putting the engines of the motor vessel full speed astern would swing the bow of the LILLIAN ANNE into the scow; nor did he know that the LILLIAN ANNE would leave her apparently safe port to port passage course and swing into the scow; and he certainly did not know and ought not to be charged with knowledge of the fact that Gatewood did not see the lights on the scow. *All he knew, and all he ought to be charged with, was that the LILLIAN ANNE was approaching on a course which would have carried her safely past the scow until she got very close when she began suddenly to swing into the scow. Then it was too late for him to do anything except to blow his backing signal and go astern on his engines.*

*The Geo. L. Garlick,* 91 F. 920, 926.

*The Manhasset* (D.C. E.D. Va.), 34 F. 408, 423.

The Circuit Court of Appeals said:

> "We find no merit in the contention that the FAIRWILL should have refused assent to the proposed port to port passage, and should have immediately given a danger signal." (R. 280).

**(7) The navigators of the LILLIAN ANNE were guilty of very gross negligence causing this collision.**

Petitioner contents itself by merely stating that there was no negligence on the part of the LILLIAN ANNE, and wisely refrains from any detailed argument on this point.

We have already shown that the navigators of the LILLIAN ANNE were negligent in failing to see the lights of the scow at any time, although every one else saw these lights, and they were certainly lit and burning brightly and properly placed on the scow.

In addition, Gatewood and Martin failed to see the scow itself until his vessel was 25 feet from it, although the negro deck hand saw it 1200 feet away (R. 101, 239), but did not report this to the wheelsman.

Also Gatewood testified that he blew a one whistle signal on a meeting course intending a port to port passage (R. 79, 80). He said he received no reply to this signal. Yet the LILLIAN ANNE continued on at full speed for a distance of 600 yards in a crowded harbor. This is negligence.

*The City of Chester* (C.C.A. 4), 78 F. 186;
*Construction Aggregates v. Long Island R.R.* (C.C.A. 2), 105 F. (2) 1009, 1012.

Admittedly, the LILLIAN ANNE was the unencumbered vessel, whereas the tug had a tow alongside. It was the duty of the LILLIAN ANNE to avoid risk of collision. This duty she did not perform.

*The Georgetown* (C.C.A. 4), 135 F. 854, 858;
*The Syracuse,* 9 Wall. 672;
*The Westhall* (D.C.E.D. Va.), 153 F. 1010;
*The Columbia* (C.C.A. 4), 207 F. 929;
*The Davidson* (D.C.E.D. Va.), 244 F. 480, affirmed C.C.A. 4, 251 F. 887.

The LILLIAN ANNE immediately after the collision backed off and passed on down the river without speaking to those on the tug and scow, or making any investigation as to their need of assistance. This was a violation of the Stand-by Act (U.S.C.A. 33, Sec. 367).

The last sentence of this Act holds that if the master of a vessel fails to stand-by and fails to render assistance to the damaged vessel "the collision shall in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default."

*The Lizzie Crawford* (D.C.E.D. Va.), 170 Fed. 837;
*The Robert Graham Dun* (C.C.A. 1), 70 Fed. 270;
*The Clara Matthieu* (D.C.D. Mass.), 25 Fed. (2) 123.

Lastly, both the District Court and the Circuit Court of Appeals held that the LILLIAN ANNE was guilty of negligence in that she was proceeding at an excessive speed in a busy and crowded harbor (R. 9, 281).

The LILLIAN ANNE's gross negligence was clearly established and there was a heavy burden on her

to prove the negligence of the tug. Every reasonable doubt with regard to the propriety of the conduct of the tug and scow should be resolved in their favor.

*The City of New York,* 147 U.S. 72, 37 Led. 84, 90;
*The Oregon,* 158 U.S. 186, 39 Led. 943, 949;
*The Eagle* (C.C.A. 9), 289 F. 661.

We respectfully submit that petitioner is in error when she states on page 29 of her brief that there was no negligence in the navigation of the LILLIAN ANNE. The negligence was so gross that it was practically admitted by Gatewood during his cross-examination (R. 94, 101), when he testified reluctantly, that had he altered the course of his vessel as little as 20 feet when the vessels were 100 feet apart, the collision would not have occurred.

## V. CONCLUSION

The real questions in this case are all of fact. There was substantial evidence to support the findings of fact in this case; they were made by two competent and careful courts, and under the decisions of this court a review is unnecessary. No conflict with local decisions and no departure from the accepted and usual course of judicial procedure has been shown. The case was correctly decided below, and we, therefore, respectfully submit that the petition for writ of certiorari should be denied.

GEORGE M. LANNING,
BARRON F. BLACK,
*Counsel for W. S. Sanders.*